IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 3, 2002 Session

BOBBY RAY SEARS v. METROPOLITAN NASHVILLE AIRPORT AUTHORITY

A Direct Appeal from the Circuit Court for Davidson County
No. 95C-1570 The Honorable Hamilton V. Gayden, Jr., Judge

No. M2001-00850-COA-R3-CV - Filed May 7, 2002

This is a negligence case under the Governmental Tort Liability Act where plaintiff was awarded money damages against defendant. Subsequent to trial, the defendant filed a motion seeking credit pursuant to T.C.A. § 29-11-105 (a)(1) for the amount paid to plaintiff by a settling co-defendant. The trial court denied the motion, and defendant appeals. We affirm.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Circuit Court Affirmed and Remanded

W. FRANK CRAWFORD, P.J., W.S., delivered the opinion of the court, in which ALAN E. HIGHERS, J. and HOLLY KIRBY LILLARD, J., joined.

D. Kirk Shaffer, Bryan E. Pieper, Nashville, For Appellant, Metropolitan Nashville Airport Authority

Mike W. Binkley, Nashville, For Appellee, Bobby Ray Sears

OPINION

Plaintiff, Bobby Ray Sears (Sears), sued defendants, Metropolitan Nashville Airport Authority (MNAA) and Republic Parking Systems, Inc. (Republic), for personal injury damages. The complaint alleges that Sears was riding his motorcycle attempting to exit a short-term parking lot at the Nashville International Airport when a wooden arm of a mechanical traffic control device fell on him causing personal injuries. The complaint alleges that MNAA and Republic were negligent in failing to adequately warn him that the lot was not suitable for motorcycle traffic because of the danger presented by the traffic control gates.

Prior to trial, Sears and Republic compromised and settled for the sum of $20,000.00, and an "Agreed Order of Compromise and Settlement" was entered by the court. The order states in pertinent part:

> IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that this case be and the same is hereby dismissed with prejudice as to Republic parking Systems, Inc. only. It is specifically noted that the Plaintiff acknowledges that Defendant, Republic Parking Systems, Inc., was in no manner negligent in this matter and was in no way responsible for the Plaintiff's alleged injuries. This case will remain on the docket pending further Orders of the Court.

At the conclusion of a nonjury trial on December 11 and 12, 2000, the trial court stated from the bench that MNAA was 51% negligent and Sears was 49% negligent, and assessed damages of $100,000.00, which was reduced accordingly to $51,000.00.

MNAA filed a "Motion for Reduction in Amount of Judgment" seeking to reduce the damage award by the $20,000.00 paid to plaintiff by Republic, relying upon T.C.A. § 29-11-105 (a)(1)(2000).

On March 5, 2001, the trial court entered the final order in the case which, *inter alia*, awarded judgment to Sears in the amount of $51,000.00 and denied MNAA's post-trial motion for reduction of the judgment. MNAA has appealed and presents the following issue for review, as stated in its brief:

> Whether the Trial Court erred in failing to reduce its judgment against MNAA in the amount of Twenty Thousand Dollars ($20,000), representing the total settlement made by Defendant Republic Parking, Inc.

Appellee, Sears, presents one issue for review, as stated in his brief:

> Whether the trial court erred in allocating 49% percent of the fault to plaintiff where the evidence is undisputed that the warning against motorcycle traffic in the parking area was so obscure and shrouded that no reasonable person would ever have seen it.

We will first consider MNAA's issue.

Consideration of this issue involves purely a question of law and, therefore, we review the record without a presumption of correctness. ***See Finister v. Humboldt Gen. Hosp.,*** 970 S.W.2d 435 (Tenn. 1998).

MNAA relies upon T.C.A. § 29-11-105 (2000) which provides:

> 29-11-105. Effect of release or covenant not to sue upon liability of other tort-feasors
>
> (a) When a release or covenant not to sue or not to enforce judgment is given in good faith to one (1) of two (2) or more persons liable in tort for the same injury or the same wrongful death:
>
> (1) It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and
>
> (2) It discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor.
>
> (b) No evidence of a release or covenant not to sue received by another tort-feasor or payment therefor may be introduced by a defendant at the trial of an action by a claimant for injury or wrongful death, but may be introduced upon motion after judgment to reduce a judgment by the amount stipulated by the release or the covenant or by the amount of the consideration paid for it, whichever is greater.

The above-quoted statute is a codification of a part of the "Uniform Contribution Among Tortfeasors Act." Chapter 575, Public Acts of 1968. T.C.A. § § 29-11-101 - 29-11-106.

In ***McIntyre v. Balentine***, 833 S.W.2d 52 (Tenn. 1992), our Supreme Court adopted a modified system of comparative fault replacing the previously applied common law doctrine of contributory negligence. In doing so, the Court noted that the adoption of comparative fault renders the doctrine of joint and several liability obsolete and as to contribution, the Court said:

> [B]ecause a particular defendant will henceforth be liable only for the percentage of a plaintiff's damages occasioned by that defendant's negligence, situations where a defendant has paid more than his "share" of a judgment will no longer arise, and therefore the Uniform Contribution Among Tort-feasors Act, T.C.A.§ § 29-11-101 to 106 (1980), will no longer determine the apportionment of liability between codefendants.

Id. at 58.

The Supreme Court later clarified the procedure for actions under the Uniform Contribution Among Tortfeasors Act. In ***Bervoets v. Harde Ralls Pontiac-Olds,*** 891 S.W.2d 905 (Tenn. 1994), our Supreme Court stated:

> Therefore, we today reaffirm ***McIntyre*** and hold that actions for contribution that are to be tried or retried after May 4, 1992, are to be tried in accordance with the principles of comparative fault. Because this case unquestionably fits in this category, on retrial the jury will determine the percentage of fault attributable to each of the defendants, and contribution will be ordered accordingly.

Id. at 908.

Since the decision in ***McIntyre,*** our Supreme Court has left no room for doubt that in a negligence action a party is only to be responsible for the percentage of fault assessed to that party by the trier of fact. ***See, e.g. Bervoets v. Harde Ralls Pontiac-Olds, Inc., supra; Owens v. Truck Stops of America***, 915 S.W.3d 420 (Tenn. 1996); ***General Elec. Co. v. Process Control Co.***, 969 S.W.2d 914 (Tenn. 1998).

As heretofore noted, contribution controversies are to be decided on the basis of comparative fault principles. ***See Bervoets,*** 891 S.W.2d at 908. In the instant case, the trial court found and the record reflects that there is simply no proof in the record concerning any negligence on the part of Republic. Notably, the order of dismissal itself reflects that there was no negligence on the part of Republic. It is clear that the trial court found a total of 100% negligence assessing 51% to MNNA and 49% to Sears, leaving no room for assessment of fault or negligence on the part of Republic.

After Republic was dismissed by the trial court, if MNNA intended to pursue the claim for reduction of its judgment by virtue of the Republic settlement, it should have amended its answer to assert fault against Republic and thus present the opportunity for an allocation of a percentage of fault against Republic. In ***Carroll v. Whitney***, 29 S.W.3d 14, 22 (Tenn. 2000), our Supreme Court held that "when a defendant raises th nonparty defense in a negligence action, the trier of fact may allocate fault to 'immune nonparties.'" For the reasons stated, the trial court did not err in denying MNAA's motion for a reduction of the judgment.

Sears has presented the issue of whether the trial court erred in assessing 49% negligence to him. Since this case was tried by the court sitting without a jury, we review the case ***de novo*** upon the record with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings, we must affirm, absent error of law. T.R.A.P. 13(d).

This rule applies to the findings of the court allocating fault to the parties in the suit. ***Cross v. City of Memphis***, 20 S.W.3d 642 (Tenn. 2000).

The record reflects that there were warning and cautionary signs at both the entrance into the parking area and at the exit of the parking area. Sears asserts that he was unable to see these signs because of their location - that they were obscured by a post placed in front of them. He admitted, however, he could see part of the wording, and he readily admitted that he knew that caution meant at least further investigation was warranted. While he contends that he could not see the warning signs because of the post, it is clear that he was able to approach the gate and take the parking ticket therefrom. If he had been using proper observation, there was no way he could miss the warning signs. Mr. Sears was a person of mature years and had many years of motorcycle experience. The finder of fact is required to consider:

> [A]ll the circumstances of the case, including such factors as:
>
> (1) the relative closeness of the causal relationship between the conduct of the defendant and the injury to the plaintiff; (2) the reasonableness of the party's conduct in confronting a risk, such as whether the party knew of the risk, or should have known of it; (3) the extent to which the defendant failed to reasonably utilize an existing opportunity to avoid the injury to the plaintiff; (4) the existence of a sudden emergency requiring a hasty decision; (5) the significance of what the party was attempting to accomplish by the conduct, such as an attempt to save another's life; and (6) the party's particular capacities, such as age, maturity, training, education, and so forth.

Eaton v. McLain, 891 S.W.2d 587, 592 (Tenn. 1994).

The trial court, as the trier of fact, must determine the weight, faith, and credit to be given to the evidence in the first instance, and the credibility accorded will be given great weight by the appellate court. ***Town of Alamo v. Forcum-James Co.***, 205 Tenn. 478, 327 S.W.2d 47 (1959); ***Sisk v. Valley Forge Ins. Co.***, 640 S.W.2d 844 (Tenn. Ct. App. 1982).

While the trial court found that MNAA could have done a better job in displaying the warnings, Mr. Sears was likewise inattentive because the warnings were there to be seen if he had been attentive. From our review of the record and considering the presumption of correctness, we do not find that the evidence preponderates against the findings of the trial court on the allocation of fault between the parties.

Accordingly, the judgment of the trial court is affirmed, the case is remanded to the trial court for such further proceedings as may be necessary. Costs of the appeal are assessed against the appellant, Metropolitan Nashville Airport Authority, and its surety.

_____

W. FRANK CRAWFORD, PRESIDING JUDGE, W.S.